

Approved For Release 2002/05/07 : CIA-RDP85-00988R000400110022-3


Department of Justice

Washington, D.C. 20530

MEMORANDUM FOR:

23 MAY 1978

Richard J. Davis
Assistant Secretary of Treasury
Department of the Treasury

 STATINTL
Assistant General Counsel
Central Intelligence Agency

Arnold E. Donahue
Chief, Intelligence Branch
Office of Management and Budget

Samuel M. Hoskinson
National Security Council Staff
The White House

John Hotis
Inspector
Federal Bureau of Investigation

Lee Martin
Office of Current Assessments
Department of Energy

Robert T. Richardson
Associate Chief Counsel
Drug Enforcement Administration

Brent Rushforth
Assistant General Counsel
Department of Defense

Daniel B. Silver
General Counsel
National Security Agency

Jeffrey H. Smith
Deputy Assistant Legal Adviser
Department of State

Maj. Gen. Jack E. Thomas
Special Assistant to the Deputy to the
DCI for the Intelligence Community
Intelligence Community Staff

Re: E.O. 12036 Procedures

After reviewing the proposed procedures submitted by the various intelligence agencies, we have concluded that it is not feasible to develop one uniform set of procedures for all agencies. However, we believe it is desirable and feasible to identify a limited number of major issues of common concern to all agencies which should be treated uniformly. Accordingly we have developed a draft of "umbrella" procedures to be adopted by the Attorney General as general procedures applicable to all intelligence agencies covered by E.O. 12036. A copy of this draft is enclosed.

This paper should be considered a working draft. We have attempted to identify all the major issues which should be covered in such procedures, but we may well have overlooked some points that should be included.

Please review this draft and submit any comments in writing by the close of business June 2, 1978. We will plan on having a meeting to discuss those comments during the week of June 5. For the convenience of all, please send copies of your comments to each individual named above.



John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Enclosure

ATTORNEY GENERAL PROCEDURES UNDER
EXECUTIVE ORDER 12036

I. SCOPE: These procedures apply to all activities described in sections 2-202 through 2-205 of Executive Order 12036 which must be specifically approved by the Attorney General under section 2-201(b). In addition these procedures define certain terms for purposes of interpreting all procedures established under Executive Order 12036 by the head of an agency within the Intelligence Community. These procedures are in addition to any procedures established by the heads of those agencies and approved by the Attorney General.

II. DEFINITIONS: For purposes of these procedures and all procedures established by the heads of agencies within the Intelligence Community and approved by the Attorney General under Executive Order 12036 the following terms shall have the following meanings and applications:

1. "Agent of a foreign power" means a person who is acting for, or pursuant to the direction of, a foreign power. [The mere fact that a person's activities may benefit a foreign power or further the aims of a foreign power is not enough to make that person an agent of that foreign power absent evidence that the person is taking directions ^{or is acting in response to a request} from the foreign power.]

2. "Authorized the type of activity involved" - For purposes of applying section 2-201(b), a "type of activity"

will be considered "authorized" by the President when there exists a written authorization signed by the President which, by its express terms, necessary implications or clear interpretation when read in conjunction with contemporaneous materials submitted to the President, authorizes the Attorney General to approve use of that technique for intelligence purposes. Minor technical modifications of basic techniques do not require separate authorization, but techniques which differ significantly in terms of the types of information acquired or privacy interests affected do require separate authorization.

3. "Collection" of information means the deliberate and intentional acquisition of information by an agency but does not include that which is acquired incidentally when obtaining information about another subject or that which is volunteered to an agency. ^{or} by another. If a particular technique will in- ILLEGIBherently involve obtaining information about a particular, known person other than the subject of the surveillance, that acquisition is within the term "collection" and is not "incidental."

4. "Consent" - Activities undertaken on the basis of "consent" shall be undertaken only if (1) the subject of the activity has specifically consented, in writing, to the particular activity; (2) (in the case of government employees

or visitors to government facilities) there is a visible, posted notice which clearly states that the place or object where the notice is posted is subject to a particular activity; or (3) the subject of a lawful investigation has orally authorized an agency employee to undertake the activity regardless of that subject's knowledge of the employee's agency affiliation.

5. "Disseminate" means to transmit information to another agency, or the non-intelligence elements within an agency.

6. "Activities for which a warrant would be required if undertaken for law enforcement purposes" - This concept is to be interpreted in the context of a specific situation and in light of law enforcement statutory and case law. If in a given situation a particular intelligence activity would, if undertaken by a law enforcement agency for law enforcement purposes, require a judicial warrant in order to be lawful, then it is an "activity" encompassed by this phrase. The phrase will take its meaning from cases determining the validity, under the Fourth Amendment and related laws, of searches and seizures in a criminal, prosecutorial context as well as relevant decisions in civil litigation.

No activity involving a physical search or non-consensual surveillance shall be undertaken without a warrant or the approval of the Attorney General under section 2-201(b) of the Executive Order unless the General Counsel of the agency LEGIB

concerned has been consulted and has rendered an opinion, in writing, that no warrant would be required in a law enforcement context. In extraordinary cases where time is of the essence, the opinion of the General Counsel may be rendered orally, with written confirmation within 72 hours. Intelligence activities shall, to the maximum extent possible, be governed by uniform rules of national application, not simply the "law of the jurisdiction" in which the activity occurs, without significant variations among intelligence agencies unrelated to the missions of the respective agencies. In order to attain this goal, General Counsel shall, where there are conflicting decisions regarding a particular activity, follow those authorities which would, if applied to the case at hand, require a warrant. If the General Counsel believes the relevant authority under this provision is in error, the matter shall be referred to the Attorney General for a final decision. Each General Counsel shall keep the Attorney General and other General Counsel informed concerning significant opinions rendered by them under this definition so that, to the maximum extent possible, intelligence agencies will follow the same general rules of law. In the event of disagreement, the opinion of the Attorney General shall control.

in the U.S. only

Where an activity is undertaken without the Attorney General's approval because of "exigent circumstances" as

defined by relevant caselaw, the agency shall seek the Attorney General's approval as soon as possible after the activity is initiated. If the Attorney General does not approve the activity, the information obtained shall be destroyed and not disseminated to any person.

When an intelligence agency engages in activities on its own property for purposes of personnel, physical or communications security, this definition does not require analysis under an assumption that a law enforcement agency was conducting the same activity for law enforcement purposes. In such cases the General Counsel shall decide whether a non-intelligence agency of the United States Government could engage in the same activity without a warrant.

7. "Electronic communications equipment" means any equipment capable of undetected interception of electronic or oral communications, except when such equipment is used solely to intercept communications of stations operating in the broadcast, amateur or citizens radio services.

omits "faction", "corporation"
8. "Foreign power" means any foreign government, political party in a foreign country, foreign military force, foreign-
? *en* [based] terrorist group, or any organization composed, in major part, of any such entity or entities.

9. [Information is] "publicly available" *information includes* [when it has been] *information* published or broadcast for general public consumption, [is/

available to any member of the public in general reference works, [is] available upon request to any member of the general public, or ^{to} [can] be seen by the casual observer.

10. Information concerns "the activities of a United States person" when it--

- (a) involves information about the person other than name, title, address, date and place of birth, or physical description; or
- (b) involves information about an organization or corporation other than its name, address, characterization (e.g. industrial firm, eleomosynary institution, fraternal organization) or the identity of its officers.

11. "In United States postal channels" - This term shall be interpreted in light of chapter 83 of Title 18 of the U.S. Code and relevant case law. If mail is protected by that chapter, it shall be considered "in postal channels." As a general rule, mail shall be considered "in postal channels" until the moment it is delivered to the addressee named on the envelope, not just to the address.

12. "Law enforcement" - One purpose of E.O. 12036 is comprehensive regulation of intelligence activities under a rule of law. Accordingly a given activity will not be

considered "law enforcement" if the agency engaged in the activity has an "intelligence" purpose for that activity, regardless of whether the intelligence purpose is characterized as "primary," "secondary," "incidental," "peripheral," or in any other way. An activity can properly be characterized as "law enforcement" if, from the perspective of the agency engaging in the activity, the activity is undertaken solely for purposes of identifying, preventing or taking appropriate remedial action against violations of applicable civil or criminal laws. An activity does not cease to be "law enforcement" if information derived from that activity might be useful to another agency for an "intelligence" purpose, unless that other agency has requested the initiation of the activity.

For purposes of this provision, an activity will be deemed to have an "intelligence" purpose if the information involved is to be used as part of a general body of foreign intelligence or counterintelligence information rather than solely in connection with enforcement activities in a specific case.

13. "Lawful counterintelligence, personnel, physical or communications security investigation" - Such investigations are intended to allow an intelligence agency to carry out appropriate functions related to the agency's duties as set forth in Section 1 of the Executive Order. Such in-

vestigations must be limited to proper targets and shall not be used to conduct "leak" investigations undertaken by targeting a particular individual who has information in order to determine that individual's source of information, without a reasonable belief that the individual who has the information is personally engaged in activities which may involve a violation of law or governmental regulations binding on that particular person.

14. "Least intrusive means possible" - An intelligence activity shall be considered to use the least intrusive means possible whenever the intrusions into a person's privacy or property are the minimum necessary to obtain the intelligence sought. No method involving a greater intrusion shall be requested or approved unless it can be demonstrated that a less intrusive means will not be feasible in the specific situation. As a general rule electronic surveillance, surreptitious and continuous monitoring and unconsented physical searches shall be regarded as more intrusive techniques than physical surveillance or other means of obtaining nonpublicly available information. Microphonic surveillance shall be considered more intrusive than telephonic surveillance and surveillances of private residential property shall be regarded as more intrusive than similar surveillances of business property. Investigations

shall be conducted to minimize the intrusions resulting from use of each technique.

*needs
work.*

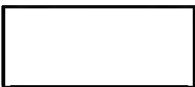
*Include
Mail?*

15. "Physical searches" - This term includes all intrusion into personal or real property undertaken to obtain tangible items or information, regardless of whether the intrusion would require a warrant in a law enforcement context. All physical searches will be regulated by the procedures required by section 2-204, but only searches for which a warrant would be required if undertaken for a law enforcement purpose will require Attorney General approval under section 2-201(b).

*Limit to
persons*

Not consistent

ILLEGIB. with E.O.



16. "Physical surveillance" - This term refers to visual observation of persons ^{or} ~~or places~~, with or without the use of any aid to human vision. If electronic or mechanical aids are used on a "continuous" basis, the technique shall be considered "surreptitious and continuous monitoring" and regulated under the appropriate procedures. If such aids are used intermittently to assist a human agent, e.g., binoculars, they shall be regulated under the physical surveillance procedures.

17. "Use any electronic or mechanical device surreptitiously and continuously to monitor." - Monitoring is surreptitious when it is conducted in such a fashion

that persons subject to the monitoring are not, in the exercise of reasonable attention to their surroundings, aware of the monitoring. Monitoring is "continuous" if it is conducted over a substantial period of time without substantial interruption. The determination whether a particular activity constitutes "surreptitious and continuous monitoring" involves a separate determination from the determination whether that activity would, if undertaken in a law enforcement context, require a warrant. A particular activity may be surreptitious and continuous monitoring but not require a warrant or Attorney General approval.

III. REQUESTS FOR ATTORNEY GENERAL APPROVAL OF TECHNIQUES UNDER SECTION 2-201(b): The procedures in this section apply to all intelligence agency requests for Attorney General approval of a particular intelligence activity under section 2-201(b) of Executive Order 12036. These procedures are in addition to the procedures established by the heads of intelligence agencies and approved by the Attorney General.

1. All requests for approval of the Attorney General shall be signed by the head of the agency concerned or by a senior official of that agency specifically designated in writing by the head of the agency. All such requests shall in addition be ^{reviewed} [approved] as to legality by the General Counsel of the intelligence agency before submission to the Attorney General.

2. Each request for approval shall contain the following information:

- a. An identification or description of the target;
- b. A statement of facts supporting the finding by the head of the agency or his delegate that there is probable cause to believe that the target, if a U.S. person or a person located within the United States, is an agent of a foreign power;
- c. A description of the significant intelligence expected to be obtained from the technique;
- d. A statement of facts supporting the finding by the head of the agency or his delegate that such significant intelligence is likely to be obtained through the technique and cannot be obtained by less intrusive means;
- e. A description of the technical means by which the technique will be effected, including a detailed description of means employed to minimize the acquisition of non-intelligence information;
- f. If any physical trespass or seizure is involved, a finding and explanation that the means employed

will involve the least amount of intrusion necessary to obtain the information;

- g. A fixed period of time for which the technique will be employed (maximum permissible periods shall not routinely be used and can be authorized only where there is a legitimate continuing need for surveillance beyond the maximum period);
- h. A statement and supporting facts concerning the possibilities of any criminal prosecution relating to or resulting from the investigation in which the technique is to be employed: } deli
?
- i. A description of the expected dissemination of the product of the surveillance;
- j. Any additional information required to meet the standards of any applicable authorization by the President. 7
- k. The name and telephone number of a person to contact for further information, if needed.

3. Requests for approval shall, except in exigent circumstances, be presented to the Attorney General at least 10 days in advance of the date the agency desires to implement the technique. No request shall be considered approved until the requesting agency has received a written authorization

signed by the Attorney General, or the Acting Attorney General, except that where time does not permit obtaining a written authorization the agency may proceed on the basis of oral advice that the Attorney General has personally approved the request and will provide written confirmation within 24 hours.